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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 605

RAYMOND H. PETERSON, *Petitioner*

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW

The opinion delivered on June 13, 1963, in the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court granting petitioner summary judgment in his claim for restoration to his former position in the Department of the Air Force. The opinion is included in the record.

JURISDICTION

By order of the Chief Justice, dated September 6, 1963, the time to file a petition for a writ of certiorari was extended to and including November 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit for restoration to his former civil service position in the Department of the Air Force was barred by laches.

STATEMENT OF THE CASE

The petitioner has been a federal civil service employee since 1940. In 1957, when he was 61 years old, and serving as a production specialist in the Air Force in Chicago his supervisor was ordered to remove or force the resignation of all the older specialists on his staff. Pursuant to this order, the petitioner was subsequently for the first time charged with failure to comply with Air Force regulations relating to the reporting of delinquent contracts, and an action instituted against him to remove him for bad conduct in failing to report such delinquency. Since the petitioner was scheduled to receive a good efficiency rating while this action was pending, his rating due on May 15, 1957 was held up in violation of the Performance Rating Act of 1950. After going through the motion of granting him a hearing, petitioner was removed from his GS 9 job paying approximately $6,250 per annum. In apparent recognition of the inequity of their action, and to forestall possible public indignation if it became revealed, and to confuse the petitioner in the pursuit of his remedy, the Air Force deliberately

failed to notify the old man that he could appeal to the Civil Service Commission, and offered him a carrot, in the form of a GS 4 job, paying $3,925, also to keep him from starving since at that time he was not eligible for retirement. Faced with Hobson's choice, petitioner accepted the lower paying job in September, 1957.

Immediately after the initial shock of the cruel and unjust action of the Air Force had worn off, petitioner initiated unceasing efforts to be restored to his old job. His efforts are described in detail in his affidavit set forth at J.A. 29-36. Finally, when it became clear that he would not obtain restoration otherwise, a suit was filed in the District Court for the District of Columbia in September 1961. In May, 1962, the Government moved for summary judgment asserting three grounds therefor: 1) that petitioner had failed to exhaust his administrative remedy; 2) that the relief sought was barred by laches; and 3) that the administrative action had complied with all procedural requirements. After the submission of pleadings in support of the motion, and oral argument, the motion was denied. Subsequently, petitioner filed a motion for summary judgment. This was heard by another judge. The same arguments were advanced by the Government and rejected by the judge who granted the motion. (The Joint Appendix contains all the pleadings in the lower court.)

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the action of the lower court and remanded the action. The single basis assigned for the reversal was that the suit was barred by laches. The Court cited as its au-

thority, its own earlier decision in *Jones* v. *Summerfield*, 105 U.S. App. D.C. 140, 265 F. 2d 124, cert. denied, 361 U.S. 841. Upon remand, in accordance with the opinion above, the District Court dismissed the suit.

REASONS FOR GRANTING THE WRIT

This case poses issues of substantial legal importance to over 2,500,000 Federal employees. Since the decision was handed down in 1919 in *U.S. ex rel. Arant* v. *Lane*, 249 U.S. 367, a everhigher barrier has been erected which prevents Federal employees from having their claims to restoration to jobs adjudicated on their merits. Instead, an artificial statute of limitations has been erected by the courts without legislative sanction or mandate. While giving lip service to the accepted equitable principles that underline the doctrine of laches, in practice, the courts have ignored the equities involved and have proceeded to dismiss suits on the most tenuous of legalistic reasons. Since 1919, the number of Federal civil service employees has increased manifold. The importance of reexamining the question has, as a consequence, become that much more urgent. Every effort should be made by this court to protect the rights of Federal employees against the Goliath of monolithic bureaucracy.

The legal principles underlying laches are beyond controversy. There must be unreasonable delay; and there must be resulting prejudice. "Unreasonable" should not be given a narrow construction by the courts. In cases involving Federal employees there is a tendency to discard reasons given for delay in filing suit on the most trivial bases. For example, in the *Jones* case, the explanation for the delay in filing the

suit for 33 months was apparently rejected because the "allegations are unsupported by the pleadings or by affidavits". Yet this is a case which requires a balancing of the equities of the contending parties and certainly the weaker party seeking relief should have the benefit of any doubt.

The defendant raising the doctrine of laches has always been required to show that there has been resulting prejudice. In cases involving the Government, however, there has been a marked tendency to accept a priori without the requirement of sustaining proof, that any delay results in prejudice. No more than a showing that the job has been filled by another has been accepted as sufficient to show prejudice. Yet any delay whatsoever would permit the raising of the contention that the job had already been filled and the new employee would be prejudiced if the old employee were restored to his old job. The Government also customarily raises the argument that restoration will cost money for duplicate salaries in some cases. The courts should examine critically and reject this argument since the wrong which resulted in the damage arises from the action of the Government and it should be made to pay for it. Under its equity powers, in some cases, the court might order that money damages not be payable. In the instant case, there is no claim for money damages.

This case is one peculiarly meriting review. Two different judges in the District Court have already considered arguments on the merits and independently concluded that the petitioner is entitled to restoration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 605

RAYMOND H. PETERSON, PETITIONER

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the district court (R. 90)[1] is unreported. The opinion of the court of appeals (Pet. App. pp. 1–2) is reported at 321 F. 2d 748.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1963. On September 6, 1963, the Chief Justice extended the time to file a petition for a writ of certiorari to and including November 4, 1963. The petition was filed on November 4, 1963. The

[1] "R" refers to the Joint Appendix which was filed in the court of appeals. A copy of the Joint Appendix is now on file in this Court.

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jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit for restoration to his former Civil Service position, instituted more than four years after his demotion, was barred by laches.

STATEMENT

In April 1957, petitioner, a non-veteran civilian employee of the Chicago Air Procurement District of the Air Force, held the position of production specialist, GS–9 (R. 48). After several official reprimands for failure to comply with required reporting procedures in regard to delinquent contracts, the personnel division, on August 9, 1957, sent petitioner a notice of final decision to remove him as of August 27, 1957 (R. 66–70). Petitioner was advised of his right to appeal the decision through the Air Force Grievance Procedure (R. 69).

Petitioner made use of the Air Force Grievance Procedure[2] by timely request for an informal review by the Commander, alleging that the penalty of removal was too severe for his infractions (R. 71). Upon review, it was concluded that the petitioner was not qualified to carry out the responsibility of his position and that removal was justified in view of the seriousness of the offense (R. 73–80). The Hearing Officer recommended that the removal action be

[2] While advised of the Air Force Grievance Procedure, through inadvertence, petitioner was not informed that (at the time he received the notice of removal) employees in his situation also had a limited right of appeal to the Civil Service Commission.

left undisturbed, that petitioner's appeal for reduction of the penalty be denied, but that petitioner be offered a lower position because of mitigating factors including his advanced age (61 years in 1957) and the prior lax supervision of petitioner.

On September 5, 1957 the Commander concurred in the Hearing Officer's recommendations (R. 86). Accordingly, petitioner was notified on September 5, 1957 that the removal decision had been upheld but that petitioner might remain with the Procurement District as a Property Clerk, GS-4, if he wished to accept the lower grade in lieu of removal (R. 82). Petitioner was notified of his right to seek review of the decision by the Major Air Command and to obtain help in preparing an appeal (R. 82-83). No appeal was prosecuted (R. 43-44). On September 6, 1957 petitioner accepted the lower grade (R. 56).

In the four years subsequent to petitioner's demotion, no legal action was taken. The present action was first instituted against the respondent Secretary of the Air Force on September 15, 1961. Petitioner sought a declaratory judgment restoring him to his GS-9 position and payment of $9,776.00, the difference between the GS-9 and GS-4 salaries for the intervening four years (R. 10-11). The complaint mainly attacked the substantive grounds for the removal and subsequent change to lower grade. The removal was alleged to have been part of a plan to rid the Service of older men (R. 5-10). It was further alleged that petitioner had been

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[1] The salary claim was subsequently withdrawn.

coerced into accepting demotion by the threat of removal (R. 10).

In his answer, respondent denied the allegations of coercion and illegality (R. 13–14), and contended that the suit was barred by laches and failure to exhaust administrative remedies (R. 12). Respondent's motion for summary judgment was denied without opinion on August 13, 1962 (R. 37).

On August 9, 1962, petitioner moved for summary judgment on several procedural issues, contending that the action was not barred for failure to exhaust administrative remedies because he had not been notified of his right to seek review by the Civil Service Commission (R. 38), that the action was not barred by laches (R. 20–22), that the removal action was illegal because of various defects in the advance notice of proposed removal (R. 37–38) and the letter of decision (R. 38) and because the Performance Rating Act had not been complied with (R. 38). On October 15, 1962 the district court, without opinion, granted petitioner's motion.

Upon appeal to the United States Court of Appeals for the District of Columbia, the decision of the district court was reversed on the ground that petitioner's claim was barred by laches. The case was remanded and subsequently dismissed.

ARGUMENT

The decision below, holding petitioner's claim barred because of his four year delay in filing suit, is plainly correct. It follows principles established by this Court in *Arant* v. *Lane*, 249 U.S. 367, and

consistently applied since then. There is no occasion for further review of the application of these principles in the present case.

As already noted, the administrative action demoting petitioner in lieu of removal became effective on September 6, 1957. Yet no further proceedings were taken until the present action was commenced more than four years later, *i.e.*, September 15, 1961. This delay has clearly prejudiced the government. Petitioner's position has been filled (R. 43). Reinstatement of petitioner would not only obligate the government to pay double salaries for a future period, but would also render the government liable for back pay for four years because of petitioner's inaction. Regard for the public purse requires a civil service employee to pursue his claim diligently, or his remedy will be lost even where serious procedural and substantive irregularities are alleged. *Arant* v. *Lane*, 249 U.S. 367 (20 months' delay); *Drown* v. *Higley*, 244 F. 2d 774 (C.A.D.C.) (two years' delay).

As the cases indicate, much shorter intervals than the four year period in this case have consistently been held to bar belated decisions to litigate. *Chappelle* v. *Sharp*, 301 F. 2d 506 (C.A.D.C.), certiorari denied, 370 U.S. 903 (34½ months' delay); *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (33 months' delay); *O'Connor* v. *Summerfield*, 239 F. 2d 69 (C.A.D.C.) (one and a half years' delay); *Haas* v. *Overholser*, 223 F. 2d 314 (C.A.D.C.), (two years' delay);

Grasse v. *Snyder*, 192 F. 2d 35 (C.A.D.C.), (sixteen months' delay); *Caswell* v. *Morgenthau*, 98 F. 2d 296 (C.A.D.C.), certiorari denied, 305 U.S. 596 (one and a half years' delay).

The explanation offered by petitioner for his delay—that it took him four years to "find the appropriate remedy" (R. 20)—is not an adequate answer. In *Jones* v. *Summerfield*, *supra*, the employee consumed approximately a year in writing to various officials seeking reinstatement, as petitioner did in the instant case. But, there, as here, such activity was held insufficient to excuse the delay in filing suit. Moreover, according to petitioner's own affidavit, he was aware by May 26, 1959, that his proper remedy was a lawsuit (R. 34). Yet he delayed an additional month before consulting a lawyer (R. 34). Petitioner was informed in early 1960 that his case would require action by a lawyer in Washington (R. 35). Refusing to proceed on the basis of that information, petitioner allegedly spent the next several months in correspondence with Admiral Radford, who also advised petitioner, on October 5, 1960, that he should obtain counsel (R. 35). Again, a month elapsed before petitioner communicated with a lawyer (R. 35) who eventually referred him to present counsel. In the circumstances, it seems plain the court below properly held the present claim barred by laches.

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1963.

U. S. GOVERNMENT PRINTING OFFICE 1963